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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 213

M. & J. TRACY, INC.,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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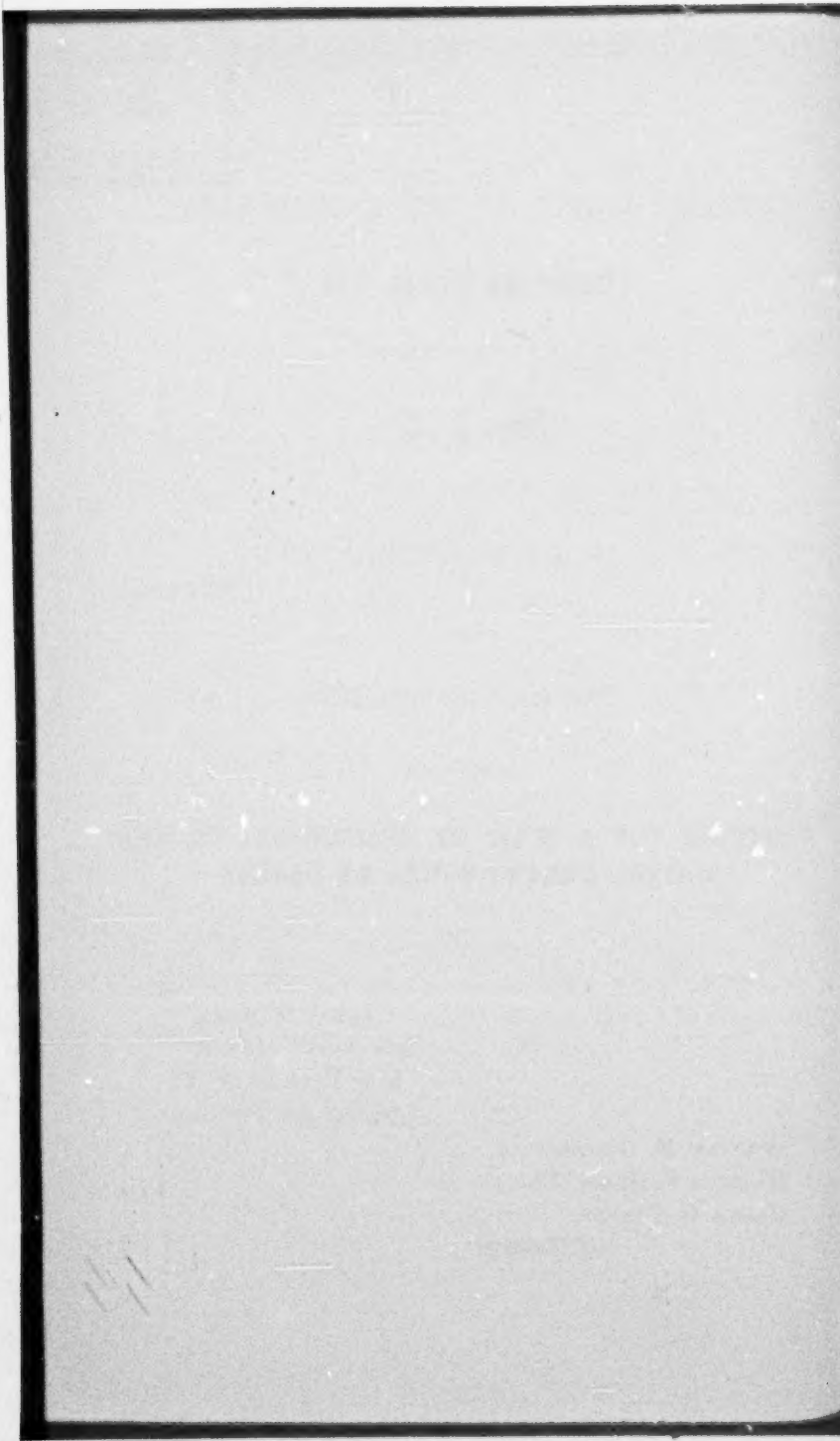

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Court of Claims is not controlling here because of vital differences in the facts and in the underlying statutes.

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Petitioner,

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THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, M. & J. Tracy, Inc., herein called "Tracy," prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled case on May 5, 1953, dismissing Tracy's petition for want of jurisdiction, on motion by the respondent, The United States, for summary judgment.

Opinion Below

The opinion of the Court of Claims (R. 30) is the sole opinion below and is not yet reported.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C.,

Section 1255(1). The judgment of the Court of Claims was rendered on May 5, 1953 (R. 30).

Statutes Involved

The pertinent statutory provisions of the following acts are printed in Appendix "A," pages 36-40, *infra.*

1. The Suits in Admiralty Act of 1920, 41 Stat. 525 *et seq.;* 46 U. S. C.Sec. 741 *et seq.*[1]

2. The Court of Claims Act, 62 Stat. 940 *et seq.;* 28 U. S. C. Sec. 1491 *et seq.*

3. Sec. 902 of the Merchant Marine Act of 1936, 49 Stat. 2015; 53 Stat. 1254; 46 U. S. C. Sec. 1242.[2]

Appendix "A" also contains certain provisions of the Urgent Deficiencies Appropriations Act of 1917, 40 Stat. 182, 183, since repealed, to which reference will be made by way of comparison.

Charter Provisions

The pertinent charter provisions are summarized in appropriate places in this brief and are set forth in detail in Appendix "B", pages 40-43, *infra.*

Summary Statement

The questions presented can best be formulated in relation to a short statement of the basic facts and applicable statutory provisions.

The United States, acting through the War Shipping Administration and its successor agency, the United States

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[1] This statute is hereinafter simply referred to as the "Suits in Admiralty Act".

[2] This statute is hereinafter simply referred to as the "Merchant Marine Act of 1936", which reference is to the Act as amended, unless otherwise indicated.

Maritime Commission,[3] requisitioned for use four of Tracy's merchant vessels under the authority of Section 902 of the "Merchant Marine Act of 1936" (R. 1, 31).

Thereafter, the United States placed certain armament and defense gear on the vessels (R. 2, 5, 31).

Section 902, subdivision (a) of the Merchant Marine Act of 1936 obligated the United States to restore the vessels to Tracy "in a condition at least as good as when taken, less ordinary wear and tear," or, in the alternative, to pay Tracy as just compensation "an amount for reconditioning sufficient to place the vessels in such condition."

This statutory obligation was restated in the Amended Time Charters promulgated pursuant to subdivision (c) of Section 902. Clause 11.A thereof required the United States "at its expense" to remove all armament and defense gear before redelivery of the vessels, and restore the vessels to their prior condition, less ordinary wear and tear. Clause 11.D provided that the United States might discharge that obligation by payment "in advance of an amount for reconditioning sufficient to provide for such work or repairs which amount shall also include compensation at the rate of hire that would otherwise have been payable under this Charter, for the time reasonably required to complete such work or repairs and compensation for other expenses incident to such work or repairs" (Appendix B, pages 42-3 *infra.*)

In the words of the Court of Claims, the said clauses made "explicit" what was implicit in the obligation to recondition imposed upon the United States by subdivison (a) of said Section 902 (R. 33).

The United States did not remove the armament and defense gear and the Maritime Commission determined that no compensation was due (R. 2, 5, 31).

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[3] The term "Commission" is used herein to designate the United States Maritime Commission and successor agencies.

Subdivision (d) of Section 902 provides that "in all cases . . . if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person . . . shall be entitled to sue the United States . . . in the manner provided for by section 24, paragraph 20, and Section 145 of the Judicial Code."[4]

Tracy sued in the Court of Claims for the sum of $49,922.89 plus interest, as just compensation for the failure of the United States to remove the armament and defense gear and restore the vessels to their prior condition, less ordinary wear (R. 2-6).

Tracy invoked the jurisdiction of the Court of Claims on the basis of the general provisions of the Court of Claims Act (28 U. S. C. Sec. 1491), and the specific provisions of subdivision (d) of Section 902, referred to above. The pertinent provisions of both acts are printed in Appendix "A," pages 36 and 38, *infra*.

Tracy's petition in the Court of Claims contains two counts. Count One is based on the United States' statutory duty under subdivision (a) of Section 902 of the Merchant Marine Act of 1936 either to recondition the vessels or to pay an amount measured by just compensation for failure to recondition (R. 1-3). Count Two is based on Clauses 11.A and D of the Amended Time Charters issued pursuant to the provisions of Section 902 of the Merchant Marine Act of 1936 (R. 3-6), which clauses make "explicit" the United States' statutory duty under subdivision (a) of Section 902 to recondition the vessels or to pay compensation in lieu thereof (R. 33).

No answer was interposed.

The Court of Claims granted a motion by the United States for summary judgment dismissing Tracy's peti-

[4] These sections, providing for action in the Court of Claims, are now 28 U.S.C. Sections 1346 and 1491. Section 1491, which is applicable here, is quoted in Appendix "A", page 36, *infra*.

tion in its entirety. The Court of Claims held that count One of the petition fails to state a cause of action within the jurisdiction of that Court, on the ground that Clauses 11.A and D of the Amended Time Charters extinguished the statutory obligation imposed upon the United States by subdivision (a) of Section 902 and that thereafter the only obligations of the United States were those set forth in Clauses 11.A and D. The Court of Claims then dismissed count Two of the petition, which is based on Clauses 11.A and D, on the ground that the cause of action therein set forth is subject exclusively to the jurisdiction of the District Court under Section 2 of the Suits in Admiralty Act of March 9, 1920 (41 Stat. 525, 526, 46 U. S. C. Sec. 741, 742; Appendix "A," page 36, *infra*).

Questions Presented

Two basic questions of law are presented. The first relates to the cause of action set forth in count One of Tracy's petition, which is based on the statutory obligation to recondition, imposed upon the United States by subdivision (a) of section 902 of the Merchant Marine Act of 1936. The second question relates to the cause of action set forth in count Two of Tracy's petition, which is based on the contractual obligation to recondition stated in Clauses 11.A and D of the Amended Time Charters.

First: Do Clauses 11.A and D of the Amended Time Charters, which merely make "explicit" the statutory obligation to recondition requisitioned vessels or pay an amount sufficient therefor, imposed upon the United States by subdivision (a) of Section 902 of the Merchant Marine Act of 1936, extinguish that statutory obligation and deprive the Court of Claims of jurisdiction over Tracy's claim, set forth in count One of its petition, for an amount measured by just compensation for failure of the United States to discharge that statutory obligation?

Second: Assuming that Clauses 11.A and D of the Amended Time Charters extinguished the statutory obligation imposed upon the United States by subdivision (a) of section 902 of the Merchant Marine Act of 1936, does subdivision (d) of said section 902 providing for suit "in all cases" by a shipowner who is dissatisfied with a determination of just compensation by the Commission, confer jurisdiction upon the Court of Claims over Tracy's claim, set forth in count Two of its petition, for an amount measured by just compensation for failure of the United States to perform the obligations stated in Clauses 11.A and D of the Amended Time Charters?

Both questions were presented and were necessarily passed upon below, for Tracy's petition was dismissed in its entirety.

Specification of Errors

The Court of Claims erred:

1. In holding that count One of Tracy's petition, based on the obligation to recondition, imposed upon the United States by subdivision (a) of Section 902 of the Merchant Marine Act of 1936, fails to state a cause of action within the jurisdiction of the Court of Claims.

2. In holding that count Two of Tracy's petition, based on the obligation to recondition set forth in Clauses 11.A and D of the Amended Time Charters, fails to state a cause of action within the jurisdiction of the Court of Claims.

3. In granting summary judgment dismissing Tracy's petition in its entirety.

Reasons for Granting the Writ

The principal reasons supporting this application may be summarized as follows:

Point I. The questions decided by the Court of Claims and presented in this petition are important issues of fed-

eral law which have not been, but should be, settled by this Court. They are important in the administration of the Merchant Marine Act of 1936 and related statutes. They have an impact far beyond the immediate situation and are of grave concern to the American Merchant Marine whose vessels might be requisitioned for defense, in the words of the Act, "at any time" during "any national emergency" or "whenever the President shall deem it advisable", situations which might easily arise during the present "Cold War".

Point II. The questions presented are substantial and were erroneously decided by the Court of Claims.

A. Count One of Tracy's petition, based on the statutory obligation to recondition, imposed upon the United States by subdivision (a) of Section 902, states a cause of action within the jurisdiction of the Court of Claims.

Jurisdiction is conferred upon the Court of Claims in general terms by the Court of Claims Act (Title 28, U. S. C. A. Sec. 1491), and in specific terms by subdivision (a) of Section 902 of the Merchant Marine Act of 1936, as amended.

Clauses 11.A and D of the Amended Time Charters which merely made "explicit" the statutory obligation imposed by said subdivision (a) of Section 902, did not extinguish that statutory obligation or deprive Tracy of the right to enforce it in the statutory forum, namely, the Court of Claims.

B. Assuming that Clauses 11.A and D of the Amended Time Charters extinguished the statutory obligation imposed upon the United States by subdivision (a) of Section 902 of the Merchant Marine Act of 1936, count Two of Tracy's petition based upon the obligation of the United States set forth in said Clauses 11.A and D, nonetheless states a cause of action within the jurisdiction of the Court of Claims.

The obligations of Clauses 11.A and D of the Amended Time Charters are measured by just compensation.

Subdivision (d) of Section 902 authorizes suit in the Court of Claims "in all cases" in which the owner of a vessel is dissatisfied with the Commission's determination of just compensation.

The Court of Claims, so far as its decision discloses, gave no consideration to the crucial provision of subdivision (d) providing for suit "in all cases".

C. The decision in *Matson Navigation Company* v. *United States,* 284 U. S. 352 (1932), relied upon by the Court of Claims, is not controlling here because of vital differences in the facts and in the underlying statutes.

In the *Matson* case, the right asserted by the owner of requisitioned vessels to reimbursement for bonuses and wage increases paid to its crew, did not flow from the requisitioning of the vessel. It "arose from the contract alone", was part of the negotiated charter hire, and was measured by a fixed formula which might produce more or less than just compensation (284 U. S. 352 at 358).

Tracy's right to a reconditioning allowance flows directly from the requisitioning of Tracy's vessels, is expressly established in subdivision (a) of Section 902 of the Merchant Marine Act of 1936, is merely made "explicit" by Clauses 11.A and D of Amended Time Charters, is not part of the negotiated charter hire, and is an amount at large, measured by just compensation. It is therefore, in essence, a constitutional and statutory right which by its very nature is cognizable in the Court of Claims under the general provisions of the Court of Claims Act and the specific provisions of subdivision (d) of the Merchant Marine Act of 1936.

Moreover, the provisions of Section 902 of the Merchant Marine Act of 1936, applicable here, have wider scope than the provisions of subdivision (e) of the Urgent Deficiencies Appropriations Act of 1917, involved in the *Matson* case.

That statute contained no counterpart to subdivision (d) of Section 902 of the Merchant Marine Act of 1936, which provides that "in all cases" an owner who is dissatisfied with the amount of just compensation determined by the Commission may sue in the Court of Claims. Subdivision (d) of Section 902 affords an additional remedy in the Court of Claims, whether the right asserted is statutory or arises under a requisition charter, a remedy not available under the earlier statute.

The decision in *Adams et al.* v. *United States,* 101 F. Supp. 956 (1952), aff'd 201 F. 2d 150 (1953), upon which the Court of Claims also relied, is inapplicable to the case at bar for reasons similar to those which distinguish the *Matson* case.

At the very least, there is substantial doubt as to the correctness of the decision of the Court of Claims on questions of widespread importance to owners of merchant vessels, sufficient to warrant review by this Court.

Point I

The Questions of Law Presented Have Not Been Passed upon by This Court and Are of Vital Importance to All Owners of Merchant Vessels.

The questions passed upon by the Court of Claims and raised in Tracy's petition at bar, have not been passed upon by this Court.

Both questions presented are questions of statutory construction arising on the face of Section 902 of the Merchant Marine Act of 1936. The questions were necessarily passed upon by the Court of Claims inasmuch as both counts of Tracy's petition were dismissed on motion by the United States for summary judgment. The questions are ripe for determination on the record of proceedings below.

The questions raise issues of widespread importance which should be settled by this Court.

The general impact of the questions presented is apparent

from the face of Section 902 of the Merchant Marine Act itself. Subdivision (a) of that section provides that when a national emergency is declared by the President of the United States, the Commission shall have the power to requisition ". . . any vessel or other watercraft owned by a citizen of the United States, or under construction within the United States . . ."

There were 36,745 such vessels registered as of the 1st day of January, 1951, of which 15,403 were vessels over 49 tons, and 21,342 were vessels of 49 tons or less.[5] Over 4,000 vessels were acquired or requisitioned by the War Shipping Administration during World War II, including 1,500 large vessels (comprising practically the entire ocean going merchant fleet of the United States), and 2,500 smaller vessels, such as tugs, barges, fishing vessels, yachts and harbor craft.[6]

The unsettled world situation strongly suggests that requisitioning of merchant vessels may again occur at any time. The need for clarification by this Court of the questions raised, is thus emphasized.

Tracy itself, has a substantial interest in the resolution of those questions. Tracy owns and operates, both coastwise and in the New York Port area, 88 coal barges 5 oil barges, 5 tugboats and 2 colliers. Additional barges and tugs are on order and will be added to the fleet in the near future. Tracy's vessels would be subject to requisitioning in the future, as they have been in the past.

Nor is Tracy the only owner of vessels presently bringing suit for the breach by the United States of its obligation either to recondition requisitioned vessels or to pay just

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[5] The Bureau of the Census (U. S. Dept. of Commerce) "Statistical Abstract of the United States: 1952", p. 553 (Table No. 671, "U. S. Merchant Marine").

[6] Testimony by Admiral Land, Hearings before the Committee on the Merchant Marine and Fisheries on H.R. 2731, House of Representatives, 78th Congress, June 10, 1943.

compensation for its failure so to do. We are informed that at least one other suit is pending in the Court of Claims, in which the owner of requisitioned merchant vessels involving similar Amended Time Charters, is seeking the sum of $64,665.00 for the failure of the United States to discharge its obligation to recondition.[7]

The questions presented, moreover, are of an immediate legal and practical importance. If the Court of Claims' decision in the case at bar is correct, the claims of owners of requisitioned merchant vessels arising out of the failure of the United States to recondition, are subject to a two-year statute of limitations under the Suits in Admiralty Act, instead of a six-year statute of limitations under the Court of Claims Act.

In summary, the questions presented are novel and have consequences which extend far beyond the case at bar and vitally affect the general administration and application of the Merchant Marine Act of 1936 and the rights of all citizens of the United States who own merchant vessels.

In our next point we shall show that the questions presented are substantial.

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[7] *Sprague Steamship Co.* v. *United States of America*, (Ct. of Claims, No. 388-52).

Point II

The Questions Presented Are Substantial and Were Erroneously Decided by the Court of Claims

A. Count One of Tracy's Petition, Based on the Statutory Obligation to Recondition, Imposed upon the United States by Subdivision (a) of Section 902, States a Cause of Action within the Jurisdicton of the Court of Claims.

Jurisdiction Is Conferred upon the Court of Claims in General Terms by the Court of Claims Act (Title 28, U. S. C. Section 1491) and in Specific Terms by Subdivision (d) of Section 902 of the Merchant Marine Act of 1936, as Amended.

Clauses 11.A and D of the Amended Time Charters which Merely Made "Explicit" the Statutory Obligation Imposed by Said Subdivision (a) of Section 902, Did Not Extinguish that Statutory Obligation or Deprive Tracy of the Right to Enforce it in the Statutory Forum, Namely, the Court of Claims.

Subdivision (a) of Section 902 of the Merchant Marine Act of 1936, provides that the United States shall either recondition requisitioned vessels or pay the owner "an amount for reconditioning sufficient" to restore the vessels to a condition "at least as good as when taken", less ordinary wear and tear.

Tracy's petition alleges in both counts, that the United States did neither. These allegations are not denied and must be deemed admitted for present purposes.

It is clear that if no charter had been executed, count One of Tracy's petition, based upon the statutory obligation imposed upon the United States by subdivision (a) of Section 902, would state a cause of action within the jurisdiction of the Court of Claims, as conferred generally by Title 28 U. S. C. Section 1491, herein called the Court of Claims

Act, and specifically by subdivision (d) of Section 902 of the Merchant Marine Act of 1936.

The question is thus presented whether the statutory obligation of the United States under subdivision (a) was extinguished by the execution of charters which in Clauses 11.A and D thereof, merely made that statutory obligation "explicit".[8] We contend that conclusion of such charters does not extinguish that statutory obligation.

The "amount for reconditioning" sufficient to restore the vessels, of which subdivision (a) speaks, is not merely the cost of labor and material, but includes other items. For example, if the United States had reconditioned the vessels, Tracy would have been entitled as a matter of statutory right, to charter hire for the days required for reconditioning. The Court of Claims recognized this when it held that, so far as reconditioning is concerned, Clauses 11.A and D of the Amended Time Charters merely made "explicit" the statutory obligation imposed upon the United States by subdivision (a) of Section 902. Clauses 11.A and D and subdivision (a) of Section 902 are, accordingly, co-extensive as to the reconditioning obligation of the United States. Thus that obligation of the United States imposed by subdivision (a) of section 902, was not extinguished by the charters but was rather reaffirmed.

The Court of Claims Act (28 U. S. C. Sec. 1491) provides in general terms, that all claims against the United States "founded upon an Act of Congress" are within the jurisdiction of the Court of Claims. Count One of Tracy's petition therefore stated a cause of action within the jurisdiction of that Court.

Moreover, the Merchant Marine Act of 1936 in subdivision (d) of Section 902 provides in specific terms that the

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[8] (R. 33). For text of subdivision (a) of Section 902, see Appendix "A" p. 36 *infra;* for text of Clauses 11.A and D, see Appendix "B" pp. 42-43 *infra.*

Court of Claims shall have jurisdiction over determinations of just compensation made by the Commission. It is true that subdivision (a) of Section 902 does not expressly state that the "amount" payable thereunder is measured by just compensation. It is plain, however, that the amount the United States is obligated by subdivision (a) to pay for its failure to recondition, cannot be *less* than "just compensation" for otherwise the constitutionality of subdivision (a) would be open to grave doubt. Nothing in Section 902 suggests that the obligation of the United States is measured by *less* than "just compensation", and nothing suggests that the obligation is measured by *more* than "just compensation". Under the circumstances, the various factors to be considered and included in determining the "amount for reconditioning" due to the owner of a vessel, are properly measured by "just compensation".

The parties, in Clauses 11.A and D of the Amended Time Charters, merely made "explicit" the statutory obligation of the United States to pay the above "amount for reconditioning", measured by "just compensation". Had the parties therein agreed upon a fixed amount or a formula in lieu of just compensation, that amount or formula might be more or less than just compensation. But Clauses 11.A and D did not fix any amount or formula, nor was any fixed amount subsequently agreed upon.[9]

Thus Clauses 11.A and D preserved and reaffirmed

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[9] See discussion page 33 *infra*. The United States suggested below that the reason why the charters did not provide for payment of any specific or liquidated amount for the Government's failure to recondition the vessels was that the Government could not "undertake to do the impossible". However, it is clear that it would not have been impossible, had the parties so intended, to agree in the charters upon a liquidated amount or set up a definite formula of calculation, or agree to arbitration by a panel of experts, or agree upon any of the many other available methods employed in innumerable cases where parties provide for liquidated damages, when the actual extent of damages is still indefinite and uncertain at the time of contracting and often defies exact calculation at any time.

Tracy's statutory right to the "amount for reconditioning" the vessels, measured by just compensation, and, as a consequence, Tracy was entitled to bring action under the specific provisions of subdivision (d) of Section 902 authorizing action in the Court of Claims by a person dissatisfied with a determination of just compensation by the Commission.

We respectfully submit that the Court of Claims misapprehended the importance of subdivision (d) of Section 902. Indeed, so far as its opinion discloses, the Court of Claims gave no consideration to subdivision (d) or to the crucial words making the remedy therein provided available "in all cases".

The significance of the words "in all cases" will be discussed at a later point in connection with our contention that even if Clauses 11.A and D of the Amended Time Charters extinguished the statutory obligation of the United States, the Court of Claims by reason of the provisions of subdivision (d) nonetheless has jurisdiction over count Two of Tracy's petition, which is based on the obligation of the United States set forth in those clauses.

Suffice it to say at this point, that Congress said "in all cases". Congress did not say "in some cases", nor did it say "in all cases with certain exceptions"; nor did it say "in cases in which no charter has been concluded". On the contrary, it used an expression which is as all-embracing as the English language permits.

The Court of Claims held that the statutory obligation imposed upon the United States by subdivision (a) of section 902 was extinguished by Clause J, subdivision 1 of the original charters (called "Requisition Time Charters"), which preceded the Amended Time Charters. Clause J, subdivision 1 of the "Requisition Time Charters" provided in substance, that agreement by Tracy to the rate of charter hire and the amount of War Risk Insurance Valu-

ation, set forth in the said charters, constituted full satisfaction of any claims *for those items.*[10]

The claim at bar is for a reconditioning allowance. Clause J, subdivision 1, would therefore be immaterial, even if it had been in effect when Tracy's cause of action arose.

Clause J, subdivision 1, however, was not in effect when Tracy's cause of action arose. The Requisition Time Charters, in which the clause appeared, were wholly superseded and replaced by the provisions of the Amended Time Charters subsequently executed.

The Amended Time Charters expressly state that "the charterer and the owner do mutually agree to amend the [Requisition Time] Charter effective upon the date hereinafter set forth *so that such charter will be as follows:*" (emphasis added) (R. 13), and the Court of Claims held that the Amended Time Charters "took the place of the Requisition Time Charters." (R. 33). The Amended Time Charters do not contain that clause. Nor do they contain any provisions remotely resembling that clause.

The opinion of the Court of Claims further states that the statutory obligation to recondition imposed upon the United States by subdivision (a) of Section 902, was extinguished because "when Tracy accepted the charter for one purpose it accepted it for all" (R. 34). Yet, the Court of Claims itself recognized that the reconditioning provisions of the Amended Time Charters, namely Clauses 11.A

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[10] "J. Special Provisions:

1. Unless the Owner otherwise indicates in the execution hereof, Rate Option 1 and War Risk Insurance Valuation Option 1 shall apply and in such event, in consideration of the compensation provided and the other obligations assumed by the Charterer hereunder, the Owner accepts this Charter in full satisfaction of any and all claims he has or may have against the Charterer arising out of the requisition of the Vessel and accepts the compensation herein provided for as the compensation required by law. . . ." (Appendix B page 41, *infra*).

and D, merely made "explicit" that which was implicit in the statutory obligation imposed upon the United States by subdivision (a) of Section 902.

We respectfully submit that there is little logic in the proposition that an express agreement by the United States to perform its statutory obligation caused Tracy to lose its right to enforce that statutory obligation in the statutory forum, namely, the Court of Claims, particularly when, as the Court of Claims conceded, the agreement did no more than make the statutory obligation of the United States "explicit".

Not only is there nothing in the Amended Time Charters to support the sweeping proposition advanced by the Court below; on the contrary, there is internal evidence in the Amended Time Charters which mitigates against that proposition.

The Amended Time Charters contain a clause designated as Clause K, which did not appear in the superseded "Requisition Time Charters". This clause specifically provides that in at least three situations the execution of a charter does not work a forfeiture of the statutory right to a determination and payment of just compensation. The right of action in the Court of Claims provided by the express provisions of subdivision (d) of Section 902 authorizing suit "in all cases" by a person dissatisfied with a determination of just compensation by the Commission, is thus preserved in such situations. (Appendix B, page 41, *infra*).

Clause K can be meaningful only as the expression of a legal principle which exists as a matter of statutory interpretation independent of the agreement of the parties, namely, that where a statutory right to just compensation is restated in a charter, the statutory remedy in the Court of Claims remains available.

Clearly the parties cannot confer jurisdiction on the Court

of Claims by agreement; nor could they oust the District Court of its jurisdiction by agreement. If it is not true *as a matter of law,* that the determination of claims for just compensation remains subject to the jurisdiction of the Court of Claims even though a charter agreement has been signed, then a mere agreement as set forth in Clause K, preserving to the Court of Claims jurisdiction over claims for just compensation arising after the "execution and delivery" of a charter, would be ineffectual and void.[11]

Clause K also illustrates the principle that a shipowner can have statutory rights and charter rights at the same

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[11] See *Home Insurance Co.* v. *Morse,* 87 U.S. 445 (1874).

In the Court of Claims the United States argued that the decision in *United States* v. *Leahy,* 148 Fed. 2nd 462 (1945), affirming *National Bulk Carriers* v. *United States,* 56 Fed. Supp. 765 (1944), supported its contention that the Court of Claims was without jurisdiction over Tracy's petition. But the *Leahy* case involved a very different situation. In the *Leahy* case, the United States argued that the Court of Claims rather than the District Court had jurisdiction over a claim by a shipowner based upon a *contract of insurance* covering the loss of a vessel. The United States argued that the parties had agreed in the charter that the amount payable for the loss of the vessel was measurable by just compensation, and that therefore the Court of Claims had jurisdiction under Section 902(d) of the Merchant Marine Act of 1936. Both the District Court and the Court of Appeals rejected this contention, pointing out that *Section 902 expressly excluded suits on insurance policies* from its coverage, and that Section 225 of the Merchant Marine Act of 1936 vests jurisdiction over such insurance claims exclusively in the District Court sitting in Admiralty. It was therefore held that ". . . a suit in the District Court to obtain reimbursement under the insurance policies issued is directly in conformity with section 902". (148 F. (2d) 462 at 466).

The argument of the United States was rejected, the Circuit Court of Appeals stating:

> " . . . The parties by their contract would have no power to oust the District Court of such jurisdiction. *Insurance Company v. Morse,* 1874, 87 U.S. 445, 20 Wall. 445, 22 L. Ed. 365; *Aktieselskabet Korn-Og Foderstof Kompagniet v. Rederi Aktiebolaget Atlanten,* 2 Cir., 1918, 250 F. 935, 937, affirmed in 1920, 252 U.S. 313, 40 S. Ct. 332, 64 L. Ed. 586".

The converse of this proposition is, of course, also true. The parties by contract cannot oust the Court of Claims of jurisdiction given to it by Congress.

time and that the existence of a charter right as to some matters does not preclude the existence of statutory rights as to other matters which are separate and distinct. Thus, the fact that the charters referred to delivery points and similar matters is immaterial. We are concerned only with the right to a reconditioning allowance measured by just compensation, which is a separate matter.

In summary, subdivision (a) of Section 902 imposed upon the United States a statutory obligation either to recondition or pay an amount sufficient therefor. Clauses 11.A and D of the Amended Time Charters merely made that obligation "explicit", but did not extinguish that obligation. Tracy therefore retained its right to sue under the Court of Claims Act for breach of that statutory obligation, in the statutory forum, the Court of Claims. Moreover, Tracy's statutory right to a reconditioning allowance is actually for an amount measured by just compensation, and as such it was properly asserted in the Court of Claims under the provisions of subdivision (d) of Section 902 of the Merchant Marine Act of 1936, providing for suit in the Court of Claims "in all cases" by a shipowner who is dissatisfied with the amount of just compensation determined by the Commission.[12]

It follows, therefore, that count One of Tracy's petition based upon its statutory right to a reconditioning allowance, stated a cause of action within the jurisdiction of the Court of Claims.

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[12] The decision in *Matson* v. *United States*, 284 U. S. 352, relied upon by the Court of Claims, is distinguished on the facts and the law in subdivision (C) of this Point II at pages 27 to 31 *infra*. There the right asserted by the shipowner, had no statutory basis, arose from the charter alone, and was not measured by just compensation but by an agreed formula.

B. Assuming That Clauses 11.A and D of the Amended Time Charters Extinguished the Statutory Obligation Imposed Upon the United States by Subdivision (a) of Section 902 of the Merchant Marine Act of 1936, Count Two of Tracy's Petition Based Upon the Obligation of the United States, Set Forth in Said Clauses 11.A and D, Nonetheless States a Cause of Action Within the Jurisdiction of the Court of Claims.

The Obligations of Clauses 11.A and D of the Amended Time Charters are Measured by Just Compensation.

Subdivision (d) of Section 902 Authorizes Suit in the Court of Claims "in All Cases" in Which the Owner of a Vessel is Dissatisfied with the Commission's Determination of Just Compensation.

Even assuming that execution of the Amended Time Charters extinguished the statutory reconditioning obligation of the United States, and substituted therefor a purely contractual obligation under Clauses 11.A and D of the Amended Time Charters, we respectfully submit that the Court of Claims has jurisdiction over the claim for just compensation stated in count Two of Tracy's petition, under the provisions of subdivision (d) of Section 902 of the Merchant Marine Act of 1936 which provide that a shipowner dissatisfied with a determination of just compensation may sue in the Court of Claims "in all cases".

The claims asserted in count Two of Tracy's petition even though they be considered as arising solely under clauses 11.A and D of the Amended Time Charters, are nonetheless measured by just compensation, for those clauses merely make "explicit" the statutory obligation imposed upon the United States by subdivision (a) of Section 902, which, as we have shown, is measured by just compensation (p. 14, *supra*).

The opinion of the Court of Claims makes no mention of subdivision (d) of Section 902, although the significance of the words "in all cases" was pressed by Tracy. The Court of Claims, in effect, repealed subdivision (d) and held that the cause of action stated in count Two of Tracy's petition was within the exclusive jurisdiction of the District Court sitting in Admiralty by virtue of the provisions of Section 2 of the Suits in Admiralty Act of 1920, 41 Stat. 525, 46 U. S. C. Sec. 742, citing *Matson Navigation Co.* v. *U. S.*, 284 U. S. 352 and *Adams* v. *U. S.*, 101 F. Supp. 956, aff'd 201 F. 2d 150.

Both those cases are wholly distinguishable from the case at bar. For clarity in presentation, we shall reserve discussion of those cases until a later point and shall first address ourselves affirmatively to subdivision (d) of Section 902.

We submit that when Congress used the words "in all cases" in subdivision (d) of Section 902, it meant to speak plainly. We further submit that a reading of section 902 as a whole demonstrates that when Congress provided for suit in the Court of Claims "in all cases", Congress did, in fact, mean precisely what it said.

The Merchant Marine Act of 1936 constituted an attempt to deal comprehensively with the problems of the American Merchant Marine. Section 902, with which we are here concerned, was designed to meet requirements of national emergencies requiring prompt action by the Maritime Commission.

Congress recognized that the requisitioning of vessels could not wait upon the negotiation of charters. Indeed, no choice whatever was given to shipowners as to the manner in which their vessels were to be used or as to other conditions of operation. Whether a shipowner accepted a charter or rejected it, such operational matters were placed en-

tirely under the control of the Commission. At the same time, however, Congress was careful to reassure the owners of requisitioned vessels that they would receive either a fixed amount agreed to by the parties, or an amount measured by just compensation. That reassurance is explicit on the very face of Section 902.

A shipowner reading Section 902 is told by subdivision (a) that if his vessel or the use thereof is requisitioned, he shall receive just compensation for the taking and for any damage to the vessel other than that caused by ordinary wear and tear.[13]

Subdivision (c) tells him that a charter will be offered to him setting forth a specific rate of hire and a specific valuation of the vessel in the event of loss. That subdivision further informs him that he may reject the amount specified in the charter and seek just compensation.

It should be noted that up to this point, there are only two instances in which there is any suggestion in Section 902 that the shipowner might lose his basic constitutional right to just compensation, and then only if he gives his consent. The two instances are: first, if he accepts the rate of hire offered, and second, if he accepts the valuation placed upon his vessel in the event of loss. Thus, a shipowner, after reading subdivision (c), would properly conclude that as to matters other than charter hire and loss valuation, he is entitled to an amount measured by just compensation unless he agrees to a fixed amount or formula in lieu thereof.

Then subdivision (d) of section 902 tells the shipowner that if he is dissatisfied with a determination of just compensation made by the Commission, he may bring suit for an amount measured by just compensation "in all cases" and may maintain his suit in the Court of Claims.

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[13] Subdivision (b), dealing with the valuation of vessels upon which a construction-differential subsidiary was paid, is not material to the issues here involved.

We respectfully suggest that Congress did not intend to place a premium upon ingenuity in interpretation, but rather was concerned with giving broad assurance to shipowners that, absent their agreement to a specific amount or formula, they would have a remedy in the Court of Claims for just compensation for damage to their vessels. To a shipowner reading Section 902, the fact that his right to seek an amount measured by just compensation is expressly made available to him in subdivision (c) in the event that he rejects a charter as a whole, and the further fact that his right to just compensation is stated in subdivision (d) to be available in the Court of Claims "in all cases", could have only one meaning, namely, that even if the shipowner accepts a charter setting forth a fixed rate of charter hire, and a fixed amount of valuation for loss of his vessel, he nonetheless retains his right to sue in the Court of Claims for any other items measured by just compensation, in the event that he is dissatisfied with the Commission's determination.

Congress, we respectfully repeat, used the words "in all cases". The holding of the Court of Claims, in effect, requires the interpolation of additional language in the statute in no way suggested by the context. The decision reduces the phrase "in all cases" to mean "in all cases prior to the acceptance of a charter, but never after the execution of a charter". Such an interpolation results in distortion of the statutory text. Indeed, when read as a whole, the statute expressly negates so restricted an interpretation. To illustrate this, we need only refer to the last sentence of subdivision (c) of Section 902 which is followed immediately by the first sentence of subdivision (d) of Section 902:

> "(c) . . . In the event of loss or damage to such property, due to operation of a risk assumed by the United States *under the terms of a charter* prescribed

in this subsection, but no valuation of such vessel or other property or mode of compensation has been agreed to, the *United States shall pay just compensation* for such loss or damage, to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage.

"(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be . . . entitled to sue the United States to recover [just compensation as determined by the Court of Claims] . . ." (Emphasis supplied).

Section 902 specifically contemplates situations in which claims for just compensation arise *after* the execution of a charter. The last sentence of Section 902(c) refers in so many words to claims for "just compensation" arising "under the terms of a charter". Undoubtedly, the remedy given by Section 902(d) to recover just compensation in the Court of Claims would be available in such cases.[14]

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[14] In the court below, the United States argued that House Report No. 660, (76th Congress, 1st Session), dealing with certain amendments to Section 902, contains a statement to the effect that it was the intent of Congress to prevent a shipowner, under all circumstances, from bringing an action for just compensation in the Court of Claims once he has accepted a charter agreement from the United States.

A careful reading of House Report No. 660 shows that the language referred to by the United States *merely discussed the limited right of action granted by subdivision (c) of Section 902*, but not the additional right of action to sue in the Court of Claims "in all cases" granted by subdivision (d) of Section 902 of the Merchant Marine Act of 1936. The critical paragraph of the Report reads as follows:

". . . *The new sub-section (c)* to Section 902 also authorizes the Commission to tender a Requisition Charter to an owner whose vessel has been requisitioned, in which *the charter hire rate is fixed* for the period the vessel is to be used. If the owner accepts the charter tendered, all further argument or contention as to just compensation is at an end, because the charter is a contract binding on both the owner and the Government. On the other hand, if the owner rejects the proffered charter, the charter-hire rate contained therein becomes

In this connection, it should be noted that Congress did not see fit to provide for uniform jurisdiction of the several matters dealt with in the Merchant Marine Act of 1936. There are sections which, by express language, confer jurisdiction over the subject matter thereof on the Court of Claims.[15] There are other sections which, by express language, confer jurisdiction on the District Court sitting in Admiralty.[16] In some instances, the Act operated to confer jurisdiction on the Court of Claims over matters theretofore subject to the jurisdiction of the District Court sitting in Admiralty.[17]

Such division of jurisdiction has ample precedent. Congress has often divided jurisdiction between the Court of Claims and the District Court sitting in Admiralty, depending upon the nature of the claim, and has established such procedure as it deemed best suited to the particular claim involved. *United States* v. *Pfitsch*, 225 U. S. 547 (1921).[18]

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the Commission's determination of just compensation. Such dissatisfied owner may then be paid 75 percent of the charter-hire rate (just compensation) and may sue in the courts for such further sum as may be determined will amount to just compensation." (Emphasis added.)

It is to be noted that the discussion here is entirely confined to Charter hire for the use of the vessel and not to just compensation for the Government's failure to recondition. Furthermore, it is clear that even in discussing the more limited rights of a shipowner under subdivision (c) of Section 902, the Congressional Committee had in mind a charter setting forth a *fixed amount* of charter hire agreed upon *in lieu of* just compensation, and not a charter which merely repeats the statutory obligation of the United States to pay just compensation, and which leaves it to the future unilateral determination of the Commission just what such just compensation might be.

[15] See, e.g., Section 402.

[16] See, e.g., Section 225.

[17] See, e.g., Section 203, dissolving the United States Shipping Board Emergency Fleet Corporation, as interpreted in *United States Shipping Board Emergency Fleet Corporation* v. *First National S. S. Co.*, 119 F. (2d) 6 (1941), cert. denied 314 U. S. 619.

[18] In *United States* v. *Pfitsch*, supra, at page 552, the Court stated: "Survey of the war legislation permitting the seizure of property discloses

It is further significant that Section 902 *twice* sets forth in the successive subdivisions (c) and (d), the right of a dissatisfied shipowner to seek judicial determination of claims for just compensation. The Court of Claims failed to give any recognition to this fact and, in effect, treated the broad right to seek a judicial determination "in all cases" granted in subdivision (d) of Section 902, as a mere restatement of the limited right provided in the preceding subdivision (c) of the said section.

We respectfully submit that the Court of Claims erred in treating this portion of subdivision (d) as though it were merely the result of inelegance in draftsmanship. We submit that, on the contrary, Congress had a purpose when it separately set forth two rights to seek judicial determination of claims for just compensation. The remedy provided in subdivision (c) specifically concerns situations *prior* to the execution of a charter, or in which a charter is rejected. But the far more inclusive remedy provided in subdivision (d) is clearly available in situations arising *after* the execution of a charter agreement.

In summary, subdivision (d) of Section 902 is remedial in character and is couched in the broadest possible terms. The internal evidence in Section 902 shows that Congress recognized that the mere execution of a charter does not preclude either the existence, or the assertion in the Court of Claims, of a claim for just compensation arising "under the terms of a charter." The claims asserted in count Two

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that Congress has established three distinct jurisdictions for the purpose of suit against the United States for compensation. In seventeen instances [referred to in a note], it definitely provided by reference to the appropriate sections of the Judicial Code for concurrent jurisdiction in the Court of Claims and the District Courts sitting as a court of claims. In the four instances it conferred jurisdiction only on the District Courts. In four instances it conferred jurisdiction only on the Court of Claims. The established rule of statutory construction should lead us to give effect in every practicable manner to the distinctions which Congress has seen fit to make."

of Tracy's petition, based upon clauses 11.A and D of the Amended Time Charters and measured by just compensation, fall squarely within the broad language of subdivision (d) of Section 902, which provides for the assertion of such claims "in all cases" in which the Commission's determination is unsatisfactory.

It follows, therefore, that count Two of Tracy's petition states a cause of action within the jurisdiction of the Court of Claims.

C. The Decision in Matson Navigation v. United States, 284 U. S. 352, Relied upon by the Court of Claims Is Not Controlling Here Because of Vital Differences in the Facts and in the Underlying Statutes.

The Facts in the Case at Bar Differ in Controlling Aspects from Those in the Matson Case.

The Provisions of Section 902 of the Merchant Marine Act of 1936, Applicable Here, Have Wider Scope than the Provisions of Surdivision (e) of the Urgent Deficiencies Appropriations Act of 1917 Involved in the Matson Case.

The Decision in Adams et al. v. United States, 101 F. Supp. 956, Aff'd 201 F. 2nd 105, Is Inapplicable Here for Similar Reasons.

The Court of Claims, in effect, ignored subdivision (d) of Section 902, and based its dismissal of count Two of Tracy's petition on *Matson Navigation* v. *United States,* 284 U. S. 352 and *Adams et al.* v. *United States,* 101 F. Supp. 956, aff'd., 201 F. 2d 150. Both decisions are wholly distinguishable from the case at bar.

In the *Matson* case, the United States Shipping Board, acting under the authority of the Urgent Deficiencies Appropriations Act of 1917, requisitioned for use certain of Matson's vessels. Requisition charters were executed.

The charters provided a fixed rate of charter hire, which rate included certain wage increases and bonuses to be paid to the crews of the vessels, in accordance with a definite formula. Thereafter, Matson sued in the Court of Claims for the unpaid portion of the charter hire represented by the wage increases and the bonuses.

Thus, the action, which was characterized by Matson as arising out of an "open, current and running account", was actually one for charter hire and not for just compensation for failure of the United States to recondition requisitioned vessels, as is the action at bar. Matson argued that it was entitled to sue for just compensation in the Court of Claims under the provisions of subdivision (e) of the Emergency Shipping Funds Provisions of the Urgent Deficiencies Appropriations Act of 1917, which, in the words of this Court (284 U. S. 352, at 357):

> ". . . authorized the requisition of the title or possession of ships 'for use or operation by the United States'. It required just compensation for requisitioned ships to be fixed by the President, and provided, in case the amount was unsatisfactory to the person entitled to compensation, that 75% of it should be paid and that suit might be brought against the United States to recover such further amount as, with that already paid, would make up just compensation."

The Court held, however, that Matson's cause of action was not one for just compensation but for charter hire fixed by a charter formula; that hence the cause of action was maritime in nature and jurisdiction thereof was vested exclusively in the District Court pursuant to the Suits in Admiralty Act. In effect it was held that the Act of 1917 gave Matson an election. Matson could either reject the charter hire offered by the United States and seek just compensation in the Court of Claims, or could accept the charter hire offered, in lieu of its right to sue for just

compensation in the Court of Claims. In the latter instance, said this Court, Matson's remedy in the event of a dispute as to the amount payable as charter hire was in the District Court sitting in Admiralty.

The opinion stressed particularly that Matson's claim was for charter hire in an amount *not* measured by just compensation. The opinion emphasized that the right to reimbursement asserted by Matson had no statutory basis and was grounded solely on the hire provisions of the requisition charters. That being so, the opinion pointed out, the amount due Matson under the charter formula might be more or less than just compensation. The Court said that Matson's right to reimbursement for the wage increase and bonuses paid by it (284 U. S. 352, at page 358):

> ". . . arose from the contract alone. Such compensation and reimbursement are not included in just compensation for the requisition, even though waiver of the constitutional right was part consideration for the obligation to pay for the operation of the ships. *The stipulated monthly payments to petitioner for ship hire were not measured by the just compensation which petitioner would otherwise have been entitled to receive, and might, in fact, be either more or less.*" (Emphasis added).

In the case at bar, however, Tracy's claim is for a reconditioning allowance not included in the charter hire. It is a claim for an amount *in addition* to charter hire and is measured by just compensation.

Furthermore, Tracy's claim, unlike Matson's has an express statutory basis. Subdivision (a) of Section 902 obligates the United States either to recondition or to pay an amount sufficient for reconditioning measured by just compensation. Clauses 11.A and D of the Amended Time Charters merely set forth obligations of the United States which are co-extensive with those imposed by subdivision

(a) of Section 902. They merely make the statutory obligations "explicit." The said clauses do not fix any amount in lieu of just compensation. Nor do they set up any formula of calculation in lieu of just compensation. It was the intent of the parties, as Tracy's petition in the Court of Claims alleges,[19] that the amount payable for reconditioning be measured by just compensation.

Had the charters involved in the *Matson* case merely repeated the statutory language of the 1917 Act and stated that the shipowner was to receive as charter hire "just compensation as determined by the President," this Court, we respectfully submit, would have reached a contrary result even under the limited statute there involved.

Apart from the foregoing factual distinctions between the *Matson* case and the case at bar, there are vital distinctions in law.

The provisions of the Merchant Marine Act of 1936 which govern this case, have a wider scope than the pertinent provisions of the earlier statute involved in the *Matson* case. This is true both as to the obligations of the United States, and as to remedies available for breach of those obligations.

The Act of 1917 imposed upon the United States no express obligation to recondition. Subdivision (a) of Section 902 of the Merchant Marine Act expressly imposes upon the United States an obligation either to recondition requisitioned vessels or to pay just compensation for failure so to do.

As to remedies, the Act of 1917, which contained but one paragraph relating thereto, was construable as providing a right of action for just compensation in the Court of Claims only if no charter had been executed. Here the statutory provisions dealing with remedies are broader. Section 902 of the Merchant Marine Act of 1936 sets forth

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[19] Petition, Par. 20 (R. 4).

two rights of action for just compensation in the Court of Claims. One is set forth in subdivision (c) and the other in subdivision (d).

The remedy provided in subdivision (c) resembles the remedy provided in the Act of 1917. Subdivision (c) provides that a shipowner can either accept a charter and the hire set forth therein, or reject it and sue in the Court of Claims for just compensation for the use of his vessel. But subdivision (d) gives an additional right of action in the Court of Claims, maintainable "in all cases" in which "the amount of just compensation determined by the Commission is unsatisfactory" to the shipowner. We have shown previously [20] that this language cannot be construed as being limited solely to claims arising in the absence of a charter.

Nothing in Section 902 suggests any limitation on the words "in all cases." On the contrary, the internal evidence in the section is persuasive that the phrase "in all cases" must be taken at face value and given its plain and inclusive meaning.

Thus vital distinctions of fact and law make the *Matson* decision inapplicable.

The decision in *Adams et al.* v. *United States* (101 F. Supp. 956, aff'd. 201 F. 2d 105), on which the Court of Claims also relied, is distinguishable for reasons similar to those which distinguish the *Matson* decision.

The vessels of Eastern Gas and Fuel Associates [21] were requisitioned by the War Shipping Administration during World War II. Charter agreements were subsequently executed. Upon redelivery of the vessels, Eastern and the United States entered into a supplemental contract whereby

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[20] Pages 23-27, *supra*.

[21] Hereinafter referred to as "Eastern". Adams and others brought action as trustees for the said company which was organized as a business trust under the laws of Massachusetts.

the United States agreed to pay and Eastern agreed to accept a fixed sum in satisfaction of the United States' obligation to recondition the vessels. This agreement was reached pursuant to Clause 11.D of the Amended Time Charters there executed, which clause appears in identical language in the Amended Time Charters in the case at bar. The clause, among other things, provides that: "If the Owner and the Charterer agree, such obligations [to recondition] may be discharged by a mutually satisfactory agreement." (See Appendix B, page 43, *infra*).

Parenthetically, no such agreement exists in the case at bar, as we shall show at a later point.[22]

Thereafter, the United States, for legally insufficient reasons which are not relevant, refused to pay the agreed amount.[23]

Eastern sued, not for just compensation, but to enforce the supplemental contract fixing the amount which the United States was to pay for reconditioning. The action was commenced in the District Court sitting in Admiralty, because Eastern was not seeking to enforce the statutory obligation to recondition imposed upon the United States by subdivision (a) of Section 902 and because the case did not present the situation specified in subdivision (d) of Section 902 where the "amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto."

Eastern recovered judgment for the amount fixed in the supplemental contract and the Court of Appeals affirmed.

The *Adams* case establishes no precedent applicable to the case at bar. Here the petition was filed in the Court

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[22] Page 33 *infra*.

[23] In the *Adams* case, the United States argued that the reconditioning compensation was not payable despite the agreement because the Government's obligation had allegedly been "merged" into later contracts providing for the exchange of the vessels in question for certain other vessels.

of Claims by a shipowner dissatisfied with the "amount of just compensation determined by the Commission" pursuant to the express provisions of subdivision (d) of Section 902 which provides for such suit "in all cases." Adams sued to enforce the supplemental contract which fixed an amount mutually satisfactory to the parties.

The correspondence between Tracy and the Commission clearly establishes that no such supplemental contract exists in the case at bar. The preliminary and exploratory correspondence did not achieve the status of a contract. The Commission sent Tracy a form of contract which Tracy signed and returned (R. 105-7). The Commission, however, did not execute the contract (R. 132-4). Thus, no contract came into being. In any event, the Commission thereafter disavowed the existence of any agreement, and Tracy acquiesced in that disavowal. (R. 135). Accordingly, any semblance of agreement was nullified.

The United States suggested below that in the *Adams* case, the District Court had based the exercise of its admiralty jurisdiction on the original charters, and not on the "mutually satisfactory agreement" between the parties. This suggestion was grounded upon the remark of the District Court that it had jurisdiction "although the United States does not concede the point." (101 F. (Supp.) 956, at 959).

The jurisdiction of the District Court was based, not upon a claim measured by just compensation, but upon the supplemental contract entered into as an accord of any such claim for just compensation.

The statement of the District Court quoted above, was addressed to the argument of the United States that the District Court was without jurisdiction over Eastern's claim. The United States argued that its obligation to recondition had been "merged" with later contracts between Eastern and the United States, which provided that

the vessels in question be traded in as part payment for certain other vessels owned by the United States; that these later contracts were not maritime in nature and that therefore the Court of Claims alone had jurisdiction. The above quoted remark of the District Court was made in rejecting the "merger" argument. The District Court did not have occasion to consider the jurisdictional consequences as between claims for just compensation for failure to recondition, and claims based on a supplemental contract which constituted an accord as to such claims. The *Adams* case involved only the latter. Thus, in the *Adams* case, neither the District Court nor the Court of Appeals considered or had any occasion to consider, the questions presented in the petition at bar.

In summary, neither the *Matson* decision nor the *Adams* decision support the dismissal by the Court below, of Tracy's petition.

Conclusion

The questions here presented have not previously been passed upon by this Court.

The questions have an importance which extends far beyond the case at bar, for they involve the rights of all owners of merchant vessels subject to requisition.

The questions are substantial. The Court of Claims' decision leaves the meaning of subdivision (d) of Section 902 of the Merchant Marine Act of 1936 and its place in the statutory scheme, completely unexplained and in effect treats it as a nullity. Further, the Court of Claims erred in treating the Urgent Deficiencies Appropriations Act of 1917 and the decision of this Court thereunder in the *Matson* case, as dispositive of the questions here presented. The provisions of Section 902 of the Merchant Marine Act of 1936 are much broader than those of the Act of 1917. The causes of action here stated have an express statutory basis in subdivision (a) of said Section 902, and are measured

by just compensation. The claim asserted in the *Matson* case had no statutory basis, arose solely out of the charter hire provisions and was measured by an agreed formula.

The *Adams* decision is similarly inapplicable to the case at bar.

At the very least, there is substantial doubt as to the correctness of the decision of the Court of Claims sufficient to warrant review by this Court in order that the provisions of Section 902 of the Merchant Marine Act of 1936 and particularly subdivision (d) thereof, may be authoritatively construed and the rights of owners of merchant vessels may be defined and protected.

For the reasons hereinabove set forth, it is respectfully submitted that this petition for the issuance of a writ of certiorari to the United States Court of Claims, should be granted.

Respectfully submitted,

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APPENDIX "A"

Statutes Involved

1. Section 1 of the Suits in Admiralty Act of March 9, 1920, 41 Stat. at L. 525, 46 U. S. C. Sec. 741, et seq., forbids the arrest or seizure of vessels owned or operated by or for the United States. Section 2, 46 U. S. C. Sec. 742 provides in pertinent part:

> "In cases where if such vessel were privately owned or operated . . . a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States . . ., provided that such vessel is employed as a merchant vessel . . . Such suits shall be brought in the district court of the United States for the district in which the parties so suing . . . reside or have their principal place of business in the United States, or in which the vessel . . . charged with liability is found."

Section 1 of the Court of Claims Act as amended, 62 Stat. 940, 28 U. S. C. Sec. 1491, provides that:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:
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> (1) Founded upon the Constitution; or
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> (2) Founded upon any Act of Congress; or
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> (3) Founded upon any regulation of an executive department; or
>
> (4) Founded upon any express or implied contract with the United States; or
>
> (5) For liquidated or unliquidated damages in cases not sounding in tort."

2. Section 902 of the Merchant Marine Act of 1936, as amended, 49 Stat. at L. 2015, 46 U. S. C. Sec. 1242, provides in pertinent part:

> "Sec. 902. (a) Whenever the President shall proclaim that the security of the national defense makes

it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property . . . When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition.

"(b) . . .

"(c) If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, the Commission, at the time of the taking or as soon thereafter as the exigencies of the situation may permit, shall transmit to the person entitled to the possession of such property a charter setting forth the terms which, in the Commission's judgment, should govern the relations between the United States and such person and a statement of the rate of hire which, in the Commission's judgment, will be just compensation for the use of such property and for the services required under the terms of such charter. If such person does not execute and deliver such charter and accept such rate of hire, the Commission shall pay to such person on account of just compensation a sum equal to 75 per centum of such rate of hire as the same may from time to time be due under the terms of the charter so tendered, and such person shall be entitled to sue the United States to re-

cover such further sum as added to such 75 per centum will make up such amount as will be just compensation for the use of the property and for the services required in connection with such use. In the event of loss or damage to such property, due to operation of a risk assumed by the United States under the terms of a charter prescribed in the subsection, but no valuation of such vessel or other property or mode of compensation has been agreed to, the United States shall pay just compensation for such loss or damage, to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage.

"(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code . . ."[24]

3. Emergency Shipping Fund Provisions of the Urgent Deficiencies Appropriations Act of 1917, 40 Stat. at L. 182 (repealed by Merchant Marine Act of 1920, 41 Stat. at L. 988, 989) provided that:

"The President is hereby authorized and empowered, within the limits of the amounts herein authorized:

"(a) To place an order with any person for such ships or materials as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity

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[24] Providing for action in the Court of Claims. The sections of the Judicial Code referred to in the quoted statute are now 28 U.S.C. Secs. 1346 and 1491.

usually produced or capable of being produced by such person.

"(b) To modify, suspend, cancel, or requistion any existing or future contract for the building, production, or purchase of ships or material.

"(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

"(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

"(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

"Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedent over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities, or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

"Whenever the United States shall cancel, modify, sus-

pend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

"The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time; PROVIDED, That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct."

APPENDIX "B"

CHARTER PROVISIONS

The record contains a copy of the Requisition Time Charter of May 26, 1942 for Tracy's vessel "CHARLES L. O'CONNOR" (R. 7-11). That Reqrisition Time Charter is identical in all pertinent respects with the Requisition Time Charters for Tracy's other vessels.

It should be noted that all Requisition Time Charters were superseded by Amended Time Charters (R. 12). Each Amended Time Charter states that (R. 13):

> "The Charterer and the Owner do mutually agree to amend the Charter upon the date hereinafter set

forth *so that such Charter will be as follows:*" (Emphasis added),

and then proceeds to give the full text of the revised agreement between the parties (R. 13 et seq.).

The superseded Requisition Time Charters contain Clause "J" which was partly relied upon by the Court of Claims. The clause, however, was subsequently deleted and did not form a part of the Amended Time Charters.

The said Clause "J" reads, in part, as follows (R. 10):

> "J. *Special Provisions:*
>
> "1. Unless the Owner otherwise indicates in the execution hereof, Rate Option 1 and War Risk Insurance Valuation Option 1 shall apply and in such event, in consideration of the compensation provided and the other obligations assumed by the Charterer hereunder, the Owner accepts this Charter in full satisfaction of any and all claims he has or may have against the Charterer arising out of the requisition of the Vessel and accepts the compensation herein provided for as the compensation required by law . . ."

The record further contains a copy of Part 1 of the Amended Time Charter of June 5, 1944, for Tracy's vessel "CHARLES L. O'CONNOR" (R. 13 et seq.). Part 1 of the Amended Time Charter for that vessel is likewise identical in all pertinent respects with Part I of the Amended Time Charters for Tracy's other vessels.

Part 1 of the Amended Time Charters contains Clause "K" which reads as follows (R. 18):

> "Clause K. *Reservation as to Just Compensation:*
>
> "Whenever the Owner hereunder is entitled to just compensation as provided under Option I Clause D or Plan I, Schedule A hereof, the rights of such Owner as to the determination and payment of just compensation under the laws and Constitution of the United States shall not be prejudiced by reason of the execution and delivery of this Charter by such Owner, and

the rights of such Owner to just compensation shall be the same as though he had not executed and delivered this Charter, provided, however, that all terms and conditions other than those relating to the determination and payment of just compensation shall not be impaired or affected by this reservation."

Part II of the respective Amended Time Charters for each of Tracy's vessels consists of the Federal Register provisions incorporated by reference from the uniform terms published in the Federal Registers of April 8, 1944; May 11, 1944 and June 6, 1944.

Among the provisions so incorporated by reference are Clauses 11.A and 11.D which read as follows (R. 21-22):

"Clause 11.A. The Charterer or any agency of the United States may, at the expense of the Charterer or such agency and on the Charterer's time, install any equipment, gear or armament, and may make any alterations or additions to the Vessel. Such equipment, gear or armament so installed are to be considered Charterer's property and are to be maintained at Charterer's expense. Such work shall be done so as not to affect the seaworthiness of the Vessel or the safety of the crew, and as not to be in contravention of any applicable law of the United States or regulation made pursuant thereto. The Charterer shall, before redelivery and at its expense and on its time, remove any equipment, gear and armament installed by or at the request of the Charterer or any agency of the United States and restore the Vessel to her condition prior to any such installations, alterations, additions or changes, whether such installations, alterations, additions, or changes were made under this Charter or prior to delivery under this Charter, except as may be otherwise provided herein."

"Clause 11.D. If, at the time of redelivery under this Charter, the Vessel shall require any work or repairs of any damage arising from risks insured against or assumed by the Charterer, or for which the Charterer is otherwise liable under this Clause, Clause 11.A or

any other Clause hereunder, the Charterer may, at its option, discharge such obligations by payment to the Owner in advance of an amount for reconditioning sufficient to provide for such work or repairs which amount shall also include compensation at the rate of hire that would otherwise have been payable under this Charter, for the time reasonably required under then existing conditions to complete such work or repairs and compensation for other expenses incident to such work or repairs. If the Owner and Charterer agree such obligations may be discharged by a mutually satisfactory agreement."

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 213

M. & J. TRACY, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 30-35) is reported at 111 F. Supp. 956.

JURISDICTION

The judgment of the Court of Claims was rendered May 5, 1953 (R. 30-35). The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims has jurisdiction of a suit by the owner of a vessel, the use of which

was requisitioned by the United States, for the cost of restoring it to its original condition where, after the requisition and before redelivery, the parties have entered into a maritime contract of time charter which comprehensively defines their rights and obligations on redelivery.

STATUTES INVOLVED

The pertinent provisions of the Suits in Admiralty Act and of the Merchant Marine Act of 1936 are set forth in the Appendix, *infra*, pp. 13-15.

STATEMENT

In May 1942, the Government, acting through the War Shipping Administration, requisitioned the use of four of the petitioner's vessels pursuant to the authority of section 902 of the Merchant Marine Act of 1936, as amended (49 Stat. 2015, 53 Stat. 1255, 46 U.S.C. 1242). In accordance with the Act, the Government subsequently submitted to the petitioner its standard forms of requisition time charter setting forth the terms which the War Shipping Administration proposed should govern the employment and operation of the vessels by petitioner for the Government (R. 7-11). Petitioner executed the charters without reservation.

These detailed requisition charters provided that the entire carrying capacity of the vessels should be placed at the disposal of the Government as charterer to be employed as it might direct, but that the petitioner should operate the vessel, furnishing the crew and equipment and providing and paying

for all provisions, supplies, crew's wages, shipping fees, etc. The Government agreed to pay petitioner a monthly rate of hire, established by the War Shipping Administration for similar vessels, and to reimburse petitioner for all actual out-of-pocket expenses, including taxes, war bonuses, extra wages and similar costs. These charters were amended on various occasions and were finally replaced by amended time charters (R. 12-20).

Under certain options permitted by the charters, petitioner elected stated monthly compensation for the use of the vessels and fixed the valuation of the vessels for the purposes of the charter and of the insurance to be provided by the charterer (R. 14, 16, 19, 34). The amended time charters, in Clauses 11.A and 11.D,[1] authorized the United States to alter and install equipment on the vessels and required the United States, before redelivery, at its own expense and its own time, to remove all such installed equipment and restore the vessels to their condition prior to installation (R. 21-2). Clause 11.D provided that in lieu of the work required under Clause 11.A, the Government might, at its option, discharge its obligation by paying the owner in advance an amount sufficient to provide for such work. It was specifically provided that this amount would include (1) compensation at the rate of hire that would otherwise have been payable under the amended time charter

[1] The amended time charters incorporated by reference certain provisions contained in the Federal Registers of April 8, 1944, May 11, 1944, and June 6, 1944 (R. 17-18).

for the time reasonably required to complete the work, and (2) compensation for other expenses incident to such work. Clause 11.D further provided that, if the owner and charterer agreed, the obligation might be discharged by a mutually satisfactory agreement.

All four vessels were redelivered early in July 1946. On June 27, 1952, petitioner filed suit for $49,922.89 in the Court of Claims (R. 1-6). In the first count of its petition, it asked for "just compensation" for putting the vessels back in their original condition, grounding its action on section 902(a) of the Merchant Marine Act of 1936 (R. 1-3).[2] In the second count, petitioner based its claim on Clauses 11.A and 11.D of the amended time charters (R. 3-6). The Government moved for summary judgment on the ground that, after petitioner accepted the time charters, its rights were governed thereby, and that the district courts had exclusive jurisdiction over claims on the charters (R. 6-7). The Court of Claims granted the Government's motion for summary judgment (R. 30-35).

ARGUMENT

1. The decision below is no more than a correct application to the particular facts here involved of the rules well established by this Court's decisions. On the Government's motion for summary judg-

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[2] Section 902(a) of the Merchant Marine Act of 1936 required the Government to return the ships to the owner in a condition at least as good as when taken, less ordinary wear and tear, or to pay the owner an amount sufficient to place the property in such condition. See Appendix, *infra*, pp. 13-14.

ment, supported by the charters which petitioner had executed, the court below correctly recognized that the foundation of petitioner's suit could only be the maritime contracts of time charter which by agreement of the parties had replaced the Merchant Marine Act of 1936 as the source and measure of petitioner's rights and the Government's obligations. *Matson Navigation Company* v. *United States,* 284 U.S. 352, 357. Suits for "just compensation" may be brought only if the one entitled to possession refuses to execute a charter. *Matson Navigation Company* v. *United States, supra* at 357-8. This has been held in analogous situations, *Albrecht* v. *United States,* 329 U.S. 599,[3] and is confirmed by Section 902(c) of the Merchant Marine Act of 1936, *infra,* pp. 14-15.

Section 902(c) clearly proceeds on the premise that the parties may agree on the terms of a charter and that, if they do, the agreement governs and dispenses with the need to litigate "just compensation." The last sentence of section 902(c), on which petitioner particularly relies (Pet. 23-24),[4] obviously refers not to reconditioning expenses but only to insurance-type losses and then only when no valuation or mode of compensation has been agreed upon. In the words of the House Committee re-

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[3] Even amounts measured by "just compensation" may not be "just compensation" in the constitutional sense, if they have their origin in an agreement. Cf. *United States* v. *Goltra,* 312 U.S. 203, 207 *et seq.*; *United States* v. *Hotel Co.,* 329 U.S. 585.

[4] "In the event of loss or damage to such property, due to operation of a risk assumed by the United States under the terms of a charter prescribed in this subsection, but no valuation of such vessel or other property or mode of compensation

port, "If the owner accepts the charter tendered, all further argument or contention as to just compensation is at an end, because the charter is a contract binding on both the owner and the Government." H. Rep. 660, 76th Cong., 1st Sess., p. 5. As the court below phrased it, "After acceptance of the charter the question of what is just compensation is no longer open; it is what the contract says it is" (R. 32).[5]

Under clause 11.D of the charters, if the Government fails to recondition, the owner is entitled to

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has been agreed to, the United States shall pay just compensation for such loss or damage, to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage."

[5] Under the earlier requisition time charters, it was provided that "* * * in consideration of the compensation provided and the other obligations assumed by the Charterer hereunder, the Owner accepts this Charter in full satisfaction of any and all claims he has or may have against the Charterer arising out of the requisition of the Vessel and accepts the compensation herein provided for as the compensation required by law" (R. 10). This covers all claims arising out of the requisition, including claims for reconditioning, and is not limited as petitioner suggests (Pet. 15-16). Obviously, the amended time charters did not remit the parties to the Merchant Marine Act by failing to repeat this provision, which was inserted out of an abundance of caution. Indeed, Clause C of the amended time charter achieves the same result by expressly providing that even in the case of an owner *rejecting* the rate of hire set forth in Option 1 [petitioner accepted this option, see *supra* p. 3], the requisition charter governs as to redelivery obligations. The rejecting owner may sue for "just compensation" because that item was never brought within the coverage of the charter, but "this Charter, in any such event, shall be deemed an agreement governing only the relations between the Owner and the Charterer in respect to matters other than the amount of just compensation for the use of the Vessel and the services required under the terms of this Charter" (R. 14, 34). The present suit involves reconditioning costs, a "matter other than the amount of just compensation for the use of the Vessel and the services required under the terms of this Charter."

an amount sufficient to pay for the work. This amount specifically includes compensation at the rate of hire agreed upon in the charter for the period required to complete the work, and compensation for other expenses incident to the reconditioning. As the court below observed, the charters "undertook to fully define the obligations of the Government for the use of the vessel" (R. 33). Thereafter, the extent of the obligation was no longer what might be implied from the Merchant Marine Act but what the maritime contracts of time charter provided specifically. The contracts put beyond controversy the owner's right to the stated rate of hire for the time needed to do the reconditioning work and to a reasonable compensation for the other expenses incident to the work. Petitioner cannot first assent to such a comprehensive contract provision respecting the measure of its reconditioning claims, and then ignore the contract provision as either surplusage or a mere declaration of the general statutory provision. Once the rights and obligations of the parties have been fixed by the maritime contract of charter party, the owner's sole right for its breach is to bring an action for damages in the admiralty court.

Contrary to the petitioner's repeated statements (Pet. 3, 13, 17), the Court of Claims never accepted petitioner's view that the charters did no more than make explicit the Government's statutory obligation. All that the court said was: "The statute *perhaps* implies that the owner shall be paid the charter rate of hire while the owner is reconditioning the vessel; the contract makes this

obligation explicit." (R. 33) (Italics supplied.) In any case, the charters were maritime agreements which superseded the statute as to the Government's obligation. The express agreement takes the place of any implied promise. *Hawkins* v. *United States*, 96 U.S. 689, 697-8. Indeed, the Court of Claims was at pains to point out that "it is not true that the contract does no more than repeat the words of the statute. It states expressly what is only to be implied from the statute" (R. 32). To the extent of any conflict, clearly the charters were controlling, for they are the foundation of the claims. The charters did much more than repeat the statutory obligation; they avoided dispute over arguable statutory implications, and substituted the final agreement between the parties.

Petitioner's action is, therefore, not a "just compensation" case, but a suit for damages for an alleged breach of a maritime contract of charter party. Moreover, neither historically nor in the Merchant Marine Act of 1936 is the duty or the measure of the duty to recondition associated with "just compensation." In fact, the petitioner is forced to interpolate "just compensation"—as a duty and as a measure—into both the statutory and charter provisions dealing with the obligation to recondition and the damages for its breach (Pet. 3, 8, 22). Petitioner concedes (Pet. 14) that "It is true that subdivision (a) of Section 902 does not expressly state that the 'amount' payable thereunder is measured by 'just compensation,'" but argues that it should be so measured, But not every *restitutio in integrum* is "just compensa-

tion". On the contrary, section 902(a) requires "just compensation" to be paid "for the property taken or for the use of such property"; only then does it provide that property taken and used should be restored to the owner in the condition it was when taken, or the owner should "be paid an amount for reconditioning sufficient to place the property in such condition." This analysis gives full effect to the several provisions of section 902 of the Merchant Marine Act and to the constitutional requirement of just compensation and at the same time prevents the diversion to the Court of Claims of admiralty litigation which belongs exclusively to the district courts.

The parties, by shifting the basis of the claim from the Constitution or statute to a maritime contract of time charter, alter their relationship so as to change its character and transfer jurisdiction over their dispute to the admiralty courts to the exclusion of the Court of Claims. For claims for damages deriving from a breach of a maritime contract, the Suits in Admiralty Act where applicable affords the exclusive remedy against the United States. *Matson Navigation Co.* v. *United States,* 284 U.S. 352; cf. *Adams* v. *United States,* 101 F. Supp. 956, 959 (D. Mass.), affirmed, 201 F. 2d 150 (C.A. 1). "* * * the District Courts are, in our judicial system, the accustomed forum in matters of admiralty; everything else being equal, no efforts should be made to divert this type of litigation to judges less experienced in admiralty." *Calmar S.S. Corp.* v. *United States,* 345 U.S. 446, 455.

There is nothing to sustain petitioner's view that Congress has changed the usual rule by conferring on owners of requisitioned vessels with reconditioning claims a choice of forums. The Merchant Marine Act does not select the Court of Claims for non-"just compensation" claims. The more specific provision is in the Suits in Admiralty Act, which prevails over the general jurisdiction of the Court of Claims, conferred by 28 U.S.C. 1491, as to suits founded on an act of Congress or on contracts with the United States. Nor does the Court of Claims have greater powers. It can grant no relief unavailable in the district court in which libelant resides or has its principal place of business, or in which the vessel is found.

Petitioner invokes the jurisdiction of the Court of Claims in the erroneous belief (Pet. 11) that it may consider claims brought within six years, 28 U.S.C. 2501, which would be barred by the two-year statute of limitations found in section 5 of the Suits in Admiralty Act, 46 U.S.C. 745. See *United States Shipping Board Emergency Fleet Corp.* v. *Rosenberg Brothers & Co.*, 276 U.S. 202, 214; *Johnson* v. *U. S. Shipping Board Emergency Fleet Corp.*, 280 U.S. 320; *Calmar S.S. Corp.* v. *United States*, 345 U.S. 446, 455, note 7. But no reason appears why the normal pattern should be varied to permit claims such as these to be channeled to the Court of Claims merely to permit petitioner the advantage of the longer limitations period.

2. The question as to the forum for the litigation of reconditioning claims covered by maritime con-

tracts of time charter is of no general importance. The long established exclusiveness of admiralty jurisdiction over all maritime contracts has not been successfully questioned by petitioner. The opinions of this Court in *Matson Navigation Co.* v. *United States,* 284 U.S. 352, and *Calmar S.S. Corp.* v. *United States,* 345 U.S. 446, are fully dispositive and do not leave any doubt or gap sufficient to call for review. Indeed, the *Calmar* case, like the present, involved a contractual claim by the owner of a time-chartered vessel. See also *Field* v. *United States,* 113 F. Supp. 190 (C. Cls.).

Additional cases of the present type are unlikely. More than six years have elapsed since all vessels requisitioned during World War II were redelivered. Section 3 of the Joint Resolution of July 25, 1947, 61 Stat. 449, 451, 454, provided that in the interpretation of section 902(a), authorizing requisitions of vessels during a national emergency, July 25, 1947, should be deemed the date of the termination of the national emergencies proclaimed by the President on September 8, 1939, and May 27, 1941. By then almost all vessels would have been redelivered. In *Adams* v. *United States,* 101 F. Supp. 956, 959 (D. Mass.), affirmed, 201 F. 2d 150 (C.A. 1), which upheld the admiralty court jurisdiction of cases like the present, the vessels were returned early in July 1946.

The only generally similar pending case to which petitioner has referred, or of which we are advised, is *Sprague Steamship Co.* v. *United States,* C. Cls. No. 388-52, filed July 22, 1952, or more than six years after redelivery. The pertinent cause of

action in that case, however, makes no mention of any maritime charter and alleges a government offer to pay $64,665.00 made in October 1946. Its allegations are grounded solely on the Merchant Marine Act of 1936 and on 28 U.S.C. 1491(1), which confer jurisdiction over claims founded upon the Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1953.

APPENDIX

The Suits in Admiralty Act of March 9, 1920, 41 Stat. 525, 46 U.S.C. 741, *et seq.* provides in pertinent part (as it appears in 46 U.S. Code):

Section 2, 46 U.S.C. 742:

> In cases where if such vessel were privately owned or operated * * * a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States * * *, provided that such vessel is employed as a merchant vessel * * *.

Section 5, 46 U.S.C. 745:

> Suits as authorized by this chapter may be brought only within two years after the cause of action arises * * *.

The Merchant Marine Act of 1936, Section 902, 49 Stat. 2015, 53 Stat. 1255, 46 U.S.C. 1242, provides in pertinent part as follows:

> SEC. 902. (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced

by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or use be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. * * *

* * * * *

(c) If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, the Commission, at the time of the taking or as soon thereafter as the exigencies of the situation may permit, shall transmit to the person entitled to the possession of such property a charter setting forth the terms which, in the Commission's judgment, should govern the relations between the United States and such person and a statement of the rate of hire which, in the Commission's judgment, will be just compensation for the use of such property and for the services required under the terms of such charter. If such person does not execute and deliver such charter and accept such rate of hire, the Commission shall pay to

such person on account of just compensation a sum equal to 75 per centum of such rate of hire as the same may from time to time be due under the terms of the charter so tendered, and such person shall be entitled to sue the United States to recover such further sum as added to such 75 per centum will make up such amount as will be just compensation for the use of the property and for the services required in connection with such use. In the event of loss or damage to such property, due to operation of a risk assumed by the United States under the terms of a charter prescribed in this subsection, but no valuation of such vessel or other property or mode of compensation has been agreed to, the United States shall pay just compensation for such loss or damage, to the exent of the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage.

(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U.S.C., 1934 edition, title 28, sec. 41,250).

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OCTOBER TERM, 1953

No. 213

M. & J. TRACY, INC.,

Petitioner,

vs.

THE UNITED STATES

PETITIONER'S REPLY BRIEF

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Petitioner respectfully calls the Court's attention to a most significant omission in the brief of the United States in opposition. The brief fails to answer petitioner's contention that Subdivision (d) of Section 902 of the Merchant Marine Act of 1936 vested the Court of Claims with jurisdiction over the instant action because whether Tracy's claim is held to be based on statute or based on contract, it is in any event a claim for an amount at large, not fixed by the agreement, and measured by just compensation.[1]

All discussion of the meaning of Subdivision (d) is pointedly avoided. No attempt is made to explain the

[1] The brief in opposition raises the question whether the amount payable for the government's failure to recondition vessels it had used was actually measurable by "just compensation", without setting forth any convincing argument. The point was fully discussed in Petitioner's brief, Point IIA, page 14.

place of Subdivision (d) in the statutory scheme. The arguments of petitioner are not met. As a matter of fact, the text of the brief does not mention Subdivision (d) one single time.

Nothing could demonstrate more impressively the validity of petitioner's request that this Court once and for all clarify the meaning of Subdivision (d) of Section 902 of the Merchant Marine Act of 1936 which in plain and all inclusive language provides that the Court of Claims shall have jurisdiction *"in all cases"* to hear complaints by persons dissatisfied with the amount of just compensation determined by the United States Maritime Commission.[2]

Respondent's principal arguments have been anticipated in petitioner's prior brief, so that further discussion thereof seems unnecessary. However, respondent now cites additional cases not previously relied upon in argument before the Court of Claims. These cases are wholly distinguishable and do not answer the questions presented by this petition. For the convenience of the Court, these cases are herewith briefly reviewed.

The cases of *U. S. Shipping Board Emergency Fleet Corp.* v. *Rosenberg Brothers & Co.*, 276 U. S. 202 and *Johnson* v. *U. S. Shipping Board Emergency Fleet Corp.*, 280 U. S. 320, cited by the United States are, of course, the authority upon which the *Matson* case was grounded. We have at length discussed the vital distinctions in law and fact

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[2] The Court of Claims' jurisdiction is to be exercised exclusively as to claims exceeding $10,000, but concurrently with the District Court as to claims for $10,000 or less. Sect. 902(d) of the Merchant Marine Act of 1936, referring to Judicial Code, Section 24, par. 20, and Section 145 (now 28 U. S. C. Secs. 1346 and 1491).

between the *Matson* case and the *Tracy* case in our prior brief.[3] These distinctions apply, of course, to the *Rosenberg* and *Johnson* cases *a fortiori*. In fact, neither case involved any determination of just compensation, or any statute remotely resembling Subdivisions (a) and (d) of Section 902 of the Merchant Marine Act of 1936.

Albrecht v. *United States*, 329 U. S. 599, allegedly involving an "analogous situation", is likewise wholly distinguishable. The case merely holds that in absence of statute or special agreement, no interest was payable on the *fixed* sum of compensation which had been agreed upon by the United States and a private party, as compensation for the taking of certain property, and which sum was payable *in lieu* of a judicial determination of just compensation.

We cannot find any conflict in the holding of that case and the contention we have here advanced. On the contrary, we have specifically pointed out the vital difference between an agreement which does no more than repeat a statutory mandate to pay just compensation, and an agreement setting forth a specific sum payable *in lieu* of such just compensation. It is precisely in that latter situation that the compensation agreed upon by the parties may be an amount "either more or less than just compensation". (*Matson* v. *U. S. Navigation Co.*, 284 U. S. 352, at page 358).

We have clearly stated that the general jurisdiction of the Court of Claims under the Court of Claims Act is exercisable not to review the fairness or unfairness of a fixed

[3] Petitioner's brief, Point II, pp. 27 to 31.

sum payable in lieu of just compensation to which both parties have freely agreed, but only to review awards of just compensation, the amount of which had not been previously agreed upon. Furthermore, the *Albrecht* case involved no statute similar to Subdivision (d) of Section 902 of the Merchant Marine Act of 1936, with its specific grant of jurisdiction to the Court of Claims to review the Commission's unilateral determination of the amount of just compensation "unsatisfactory to the person entitled thereto."[4]

Hawkins v. *U. S.*, 96 U. S. 689 is cited for the proposition that implied oral promises and representations are superseded by the express written provisions contained in the charter. That case has no application here. No contention is made that the government made any implied promises. Tracy's claim is based upon the express obligations of the United States set forth in the statute and in the charter.

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[4] *United States* v. *Goltra*, 312 U. S. 203 and *United States* v. *Hotel Co.*, 329 U. S. 585, cited in a footnote in the brief, are likewise cases considering the question whether interest was payable upon an award of just compensation, under the particular circumstances. The jurisdiction of the Court of Claims to award just compensation was never questioned in either case.

In the *Goltra* case, this Court found that no interest was payable because Congress had conferred jurisdiction over the action for just compensation for the taking of certain ships, to the Court of Claims by a "private jurisdictional act" which made no mention of interest, the Court saying that such acts of Congress must be strictly construed.

In the *Hotel* case also, no question arose as to the jurisdiction of the Court of Claims. This Court held that a Congressional act, authorizing the leasing of certain property and providing for the payment of just compensation in the event of the retaking of the property, was to be construed as not providing for the payment of interest, in absence of express language to that effect.

The brief in opposition finally cites *Calmar SS. Corp.* v. *U. S.*, 345 U. S. 446. This case holds that a vessel operating under a time charter was operated as a merchant vessel even though it carried military supplies. Thus, a claim for additional charter hire, and for compensation for the loss of the vessel brought against the United States *as an insurer*, was a claim cognizable in the Admiralty Courts. Suffice it to say that this was not an action for a reconditioning allowance, measured by just compensation, brought by a person "dissatisfied with the Commission's determination of just compensation" which Congress specifically has made subject to the jurisdiction of the Court of Claims "in all cases."[5]

This Court, speaking through Mr. Justice Frankfurter, specifically pointed out (345 U. S. 446, 97 L. ed. [Advance] 695, at [Advance] page 701), that it reached its decision because there was "no authoritative indication that Congress wished [contrary] results", and felt constrained to hold as it did "in the absence of guidance from Congress."

Here however, Congress has spoken in clear and unmistakable language. It has provided that a person aggrieved

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[5] *Field* v. *U. S.*, Ct. Cl., 113 F. Supp. 190 (July 1953), cited by respondent, was likewise a claim on an insurance policy held subject to the jurisdiction of the Admiralty courts, and not an action for just compensation. There is no conflict between that decision and the contention of petitioner herein. As we had occasion to point out in our prior brief (Footnote 11 on page 18, discussing *U. S.* v. *Leahy*, 148 F. (2) 462 (1945)) suits on insurance policies are expressly excluded from the scope of Section 902 of the Merchant Marine Act of 1936. It should be noted, however, that the Court of Claims, in support of its decision in the *Field* case, cites *M. & J. Tracy* v. *U. S.*, Ct. Cl., 111 F. Supp. 956 (1953), the very decision for which petitioner here seeks this Court's review. The fact that the case is now cited and being relied upon as authority emphasizes the necessity for review and clarification of the legal issues involved by this Court.

by the United States Maritime Commission's determination of just compensation shall "in all cases" have the right to a hearing in the Court of Claims. The plain mandate from Congress cannot be simply ignored.

The failure of the Court of Claims to heed the jurisdictional distinctions Congress has seen fit to make, and the absence of any discussion and explanation of the meaning of Subdivision (d) of Section 902 of the Merchant Marine Act of 1936 in the decision of the Court of Claims, clearly indicates the importance of having this Court pass upon the questions presented, an importance which extends far beyond the case at bar, for the questions involve the rights of all owners of merchant vessels whose vessels may be subject to requisition, in the words of the Act, "whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency" proclaimed by the President, events which may occur again at any time.

Respectfully submitted,

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